VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., *Editor.*

R. C. WALKER AND T. B. BENSON, *Associate Editors.*

Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

The 1916 Meeting of the Virginia State Bar Association.

The Association met at the Hotel Chamberlain at Old Point Comfort on Tuesday July 11th. There was an unusually small number of the members present—about seventy-five out of six hundred. The time of the meeting may have something to do with this small attendance; for many of the courts continue their sittings well into July and lawyers are either engaged in trying cases or in waiting for cases to be called. In our own case, to our great regret we had to forego attending the meeting on account of two cases set for trial the days that the Association met. The papers read before the Association were highly spoken of and no doubt will be read with much interest by those who received the annual reports of the transactions of the Association.

The President, Hon. Eppa Hunton, delivered the annual address, which was enthusiastically received. The Secretary's report showed a membership of 599 active and 67 honorary members. Eighteen losses during the year were made up by nineteen new members. On Wednesday Mr. R. Gray Williams read a paper entitled "Some Suggested Changes in the Law of Wills in Virginia," which was declared to be exceedingly able and interesting. This paper was referred to the Commission on Code Revision of the Legislature against the protest of Mr. Bilesoly, who wanted it referred to the Committee of the association on Legislation.

Mr. John G. Haskins was elected President of the Association, after a fight over the method of making nominations. A fight over anything must have been grateful to the members who are accustomed of late years to a calm unruffled acquiescence in most things proposed. Resolutions were passed highly compli-

mentary to Judge Keith, commending his career upon our Supreme Bench.

On Thursday Secretary of War Lindley M. Garrison delivered a brilliant address on "The Ideal Basis for The Law." The annual banquet was held on Thursday night and to attend that many other members of the Association were on hand.

The problem it seems to us confronting the Association is to increase the attendance at its meetings and to arouse a greater interest in its work. That the Association has accomplished many things cannot be said, but that it has accomplished much cannot be gainsaid. We believe it might be worth while to try a meeting in Richmond in February. February is an off month in many ways and we believe a larger number of lawyers would attend a meeting in the Capitol City in the winter months than now assemble—more for pleasure than anything else at a summer watering place. It might be worth the trial, anyway.

Bills of Exceptions Again.

Apropos of our editorial in regard to the two conflicting Acts of bills of exceptions in our July number, we take pleasure in inserting a letter from Mr. Marshall R. Peterson, the author of the "long Act" in our editorial. This letter, of course, is of great value in explaining the views of the person who ought to know best the meaning of his own Act, which, however, needs very little explanation, it being a most excellent, clear and much needed piece of legislation. The letter is as follows:

JULY 8, 1916.

Editor, Virginia Law Register, Charlottesville, Va.

DEAR SIR: The writer, who is the author of the act in terms abolishing bills of exception, as adopted by the recent session of the Legislature, has read with interest the editorial commentary in the July number of the REGISTER upon the *contretemps* arising from the apparent conflict of this bill with the other act approved on the same day dealing with the same subject as it appears at page 722 Acts of 1916.

The object of the bill as prepared by me, which after slight amendment of its seventh section, was duly adopted, is apparent

to every practitioner who, like the writer, has, no doubt, often wondered that the artificial form of the common law bill of exceptions should have been so long suffered to endure to vex the busy lawyer and to encumber the record with its solemn and prolix phraseology. How finical the courts have been with respect to the statutory punctilios respecting the scope and authentication of these episodic features of a cause, and how often a meritorious cause may have been lost on appeal by a technical "fluke," due to the misprison or inadvertence of court or counsel in the completion of the record by the necessary bill, is abundantly established in the Virginia Reports.

To save time, to enlarge the powers of courts of review, to eliminate as much of the rubbish of formula as possible, consistently with clearness, and to mitigate costs of appeal, constituted the object which the draftsman had in view. If the act as it now stands, or may be hereafter amended or re-enacted, shall subserve these purposes, he will have obtained his reward. Meanwhile, that the bill should have received the sympathetic approval of the LAW REGISTER is exceedingly gratifying to the writer.

The other act, appearing at page 722 of the Acts of 1916, was designed, according to the writer's information, as an "enabling act" to authorize the Supreme Court of Appeals to take cognizance of the evidence in the *Canter* case on writ of error to the circuit court of *Washington* county, and to prevent what in its judgment would have been a hardship to the plaintiff in error, who, else, would have had to suffer a capital sentence under circumstances deemed by the appellate court insufficient for his conviction. While general in its terms, the latter act was therefore an instance of special legislation, and evinces the unwisdom of seeking to remedy the hardship of a particular case by engrafting upon the body of the law any feature that is not conceived with due regard to the symmetry of the whole fabric. Hard cases thus make bad statutory, as well as bad judicial, law. Which of the two acts is entitled to precedence is a question about which there is some contrariety of opinion, as you very well point out. The opinion is entertained in some quarters that the act first taking effect, being intended as an emergency measure, is superseded by the act last to take effect, especially in view of the manifest

intention of the Legislature by explicit declaration to abolish the bill of exceptions and to substitute therefor the statutory form. The general sense of the bar, however, as far as the writer is aware, seems to consider it the safer course to preserve the exception both by the ancient method and by the statutory form. The question, it would seem, might be readily raised, and easily disposed of, by a mandamus to compel a *nisi prius* judge to sign one, rather than the other, form of exception in a proper case.

Very Respectfully,

MARSHALL R. PETERSON.

This letter plainly shows that there can be no way in which these Acts can be reconciled and until we have some decision from the courts, Mr. Peterson's suggestion that parties proceed under both laws will probably be the only safe rule, as tedious and cumbersome as it is.

The short Act on p. 722 of the Acts of 1916, exemplifies what we have so often alluded to in the REGISTER, that one of the worst things a legislative body can do is to enact a special Act to cure some hard case. The one hard case may be cured, but five hundred other cases are produced and the law left in hopeless confusion. It is to be sincerely hoped that committees of the legislature hereafter will look more closely into the conflicting bills offered for passage and too often enacted in the law.

The Reform of Judicial Procedure.

Amongst the transactions of the Virginia State Bar Association at its meeting to which we have alluded above nothing should invite the earnest attention of the profession more than the report of the Committee on Reform of Judicial Procedure, which we deem of sufficient importance to report here in full. It is as follows:

To the Virginia Bar Association:

Your Committee respectfully begs leave to report that the last Legislature unanimously enacted the bill recommended by the Association as follows:

"Chap. 521.—An Act to amend and re-enact section 3112 of the Code of Virginia.

Approved March 24, 1916.

"1. Be it enacted by the general assembly of Virginia, That section thirty-one hundred and twelve of the Code of Virginia be amended and re-enacted so as to read as follows:

"Sec. 3112. The supreme court of appeals shall, from time to time, prescribe the forms of writ and make general regulations for the practice of all the courts of record, civil and criminal; and shall prepare a system of rules of practice and a system of pleading and the forms of process to be used in all the courts of record of this State, and put the same into effect."

There no longer remains a question of the power of the Supreme Court of Appeals to substitute rules for statutes in the regulation and direction of the trial courts. The statute is sufficiently broad to reestablish the organic equable division of power and duty between the Legislative and Judicial departments. This being the great principle involved there need be no regret at the failure of a small appropriation to defray certain necessary incidental expenses of the Court. This will be provided. The failure to create a statutory Commission to aid the Court in its work, is as it should be, because the Court is left free to proceed with or without a Commission as appeals to its judgment. It is unhampered by any statutory restriction whatever. This was the case with the federal equity rules and it worked well. It need not be said that every lawyer and judge in Virginia will freely respond to the best of his ability to any call made upon him by the Supreme Court in the work of modernizing the procedure of the courts, now that the Constitutional relation between the departments of government have been restored.

There is assurance, within a reasonable time, of a system of rules for the law side of the federal courts. The spirit and ideal of uniformity commend the adoption of this system by the States with such changes as might be demanded by peculiar local conditions. Incidentally, as well as in response to a great principle, this would solve the problem now before the Supreme Court.

The unanimous voice of the Virginia Legislature in complying with a recommendation of this Association, in view of the volun-

tary surrender of power improperly but uninterruptedly, exercised for more than half a century, manifests an inspiring faith of the people in their organized lawyers. It marks a new era of judicial relations assuring the division of governmental power entertained by the founders of governments in America, as is evidenced by all of their correspondence and public utterances. The sacred Virginia Bill of Rights demanded the return of all Legislators and Executives at stated periods to the body of the people from which they came, but its author and all the Constitution Makers recommended life tenure and adequate compensation for judges. Indeed, Mr. Madison predicted that if the federal government failed, its destruction would be the result of legislative trespass upon the judicial department.

There will be no one to dispute that the new and wholesome sentiment manifest in Virginia and all over the United States adds to the present responsibility of lawyers and judges and should quicken in them a livelier sense of duty and a renewed spirit of service. There must be no backward step. The opportunity is present to perfect in this State a system of simple correlated rules, even more perfect than those in use in the English nisi prius courts, which will reflect the genius of the government and which will justify the confidence of the people in their lawyers and their courts.

Your Committee wishes to give expression of its appreciation of the active militant support of commercial organizations and particularly the National and the several local Credit Men's Associations. They embraced the Bar Association's program in its entirety and gave their unstinted aid.

Having achieved the purpose for which it was created the life of your Committee now ends. Inasmuch as the constructive, the most important part of the campaign is just beginning, it is recommended that there be created a new and permanent Committee to be known as the "Virginia Judicial Commission" to be composed of five members and which shall have power to perform such duties and take such action as may appear essential, expedient and proper in bringing about the adoption of a uniform, simple and scientific system of rules for the regulation and direction of the procedure and practice of the trial courts, and

to recommend from time to time such changes in the structure and operation of the courts as would tend to a more certain, economical and expenditious administration of justice in Virginia. The belief is ventured that in the work of this Commission there would crystallize the best thought of the active lawyers and law teachers of the State to the end that legislation not first approved by it would be prevented, whereupon the juridical development would be scientific and moderate and in response to correlation and not individualism. There would be a centralization of responsibility for legislation concerning the courts and the practice therein, but its greatest merit would be the assurance to Legislators, heretofore sought by them and not found. If the Legislature has often erred concerning the science of the Judicial Department, the organized lawyers have just as often been remiss in not authentically pointing the true way.

Respectfully submitted,

THOMAS W. SHELTON, *Chairman,*
JAMES H. CORBITT,
ROBERT T. BARTON,
A. S. BUFORD, JR.
A. W. PATTERSON.

The President of the Association in accordance with the suggestions of the report appointed a judicial commission composed of the same gentlemen who signed the report, with the power to perform such duties and take such action as may appear essential, expedient and proper in bringing about the adoption of a uniform, simple and scientific system of rules for the regulation and direction of the procedure and practice of the trial courts. This committee has an important and heavy duty devolving upon it, for it will have to watch the operation of the judicial department and to recommend from time to time such changes in the structure and operation of the courts as will tend to more certainty, economically and expeditiously administer justice in Virginia. We need only name the Chairman, Thomas W Shelton, of Norfolk, to give the assurance that if ability, energy and an earnest desire to carry out this needed reform are essential, all will be found in him.

That sureties are "favorites of the law" is an ancient rule founded on justice and right reason. The courts, it is true, have sometimes "played the favorite" to an extent which seemed hardly just to the creditor. The coming into the field of large corporations who for hire become sureties has developed a new phase of the law and the old rule of *strictissimi juris* has been much relaxed. In view of the daily increasing business of these companies in the line of suretyship it may be of some value to the profession to see to what extent the courts have relaxed the rule where such companies are concerned.

The Rule of Strictissimi Juris as Applied to Surety Companies.

The Supreme Court of the United States in October 1903, in the case of *U. S. F. & G. Company* v. *United States,* 191 U. S. 415, said as follows:

"The rule of *strictissimi juris* is a stringent one and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the sub-contractor with a view of furthering the beneficent object of the statute. Of course this rule would not extend to cases of fraud, or unfair dealing on the part of the subcontractor."

In the case of the *City of New Haven* v. *Eastern Pav. Brick Company,* 78 Conn. 689, 63 Atl. 517, the court holds that the surety company which engaged in the business for a consideration is not in the position of a surety company for accommodation, and it has been held that such a company is held to a stricter liability than the ordinary surety, and the rule that sureties are favorites of the law is not applicable to it. *Brandrup* v. *Empire State Surety Company,* 111 Minn. 376, 127 N. W. 424; *Hull* v. *Massachusetts Bonding & Insurance Co.,* 120 Pac. 544; *Young* v. *American Bonding Co.,* 228 Pa. St. 373, 77 Atl. 623. In the case of the *Town of Whitestone* v. *Title Guarantee & Surety Co., 72* Misc. R. (N. Y) 498, 131 N. Y. Supp. 390, the rule is announced that "The ordinary rule of construction applicable to

instruments creating the relation of principal and surety does not apply to a bond executed upon a consideration by a corporation organized to make such bonds for profit, but in such a case any doubtful language should be construed most strongly against the surety and in favor of the indemnity which the insured had reasonable grounds to expect; and in *Rule* v. *Anderson,* 160 Mo. App. 347, 142 S. W. 358, it is said that the distinction between the construction given to bonds of voluntary sureties and of surety companies has been applied in the case of a bond to secure the performance of a building contract and which recites that it is executed by the contractor as principal and by another as surety, it being declared that though in the former case the bond is void if not signed by the principal, yet that this rule has no application in the case of a surety company which has collected and retained the premium charged for the bond and has treated the instrument as properly executed until a loss has occurred, and that where the changes which were made without the consent of the surety affect the identity of a building contract, then the surety will be discharged, notwithstanding that such changes do not increase or diminish the risk of the surety. This should apply only in cases of voluntary suretyship and not in cases where the surety is engaged in the business of suretyship for hire. The tendency of the courts in construing such contracts has been to apply to them many of the general rules and principles which control in the case of insurance contracts, and in *Brown* v. *Title Guarantee & Surety Company,* 223 Pa. St. 337, 81 Atl. 410, the Supreme Court of Pennsylvania has said that such a contract of a corporation for a money consideration is in the nature of a contract of insurance, and the rule of *strictissimi juris* which applies to an individual surety is relaxed as to such a corporation.

So in Iowa, *Van Buren, etc.* v. *American Surety Co.,* 137 Iowa 490, 115 N. W. 24, and in *Boppart* v. *Surety Company,* 140 Mo. App. 683, 126 S. W. 771, Broaddus, presiding Justice, said: "The obligations of a surety company, while not strictly insurance, partake more or less of that character. They clothe the obligations with all sorts of conditions for the violation of any of which they provide for discharge from liability altogether, not-

withstanding they have reaped the benefits of the obligation. They stand on a different footing from the ordinary or straight obligation, uncoupled with any conditions whatever except those provided for in the letter of the contract itself."

Probably the conclusion of the whole matter is well laid down in the case of *Rule* v. *Anderson, supra,* where the Supreme Court of Missouri said, "The special solicitude of the law for the welfare to voluntary parties who bind themselves from purely disinterested motives never comprehended the protection of big enterprises organized for the express purpose of engaging in the business of suretyship for profit. To allow such companies to collect and retain premiums for their services created according to the nature and extent of the risk, and then to repudiate their obligations on slight pretexts that have no relation to the risk, would be most unjust and immoral, and would be a perversion of the wise and just rules designed for the protection of voluntary sureties. The contracts of surety companies are contracts of indemnity and as such fall under the rules of construction applicable to contracts of insurance. Since they are prepared by the companies and generally bound with conditions and stipulations devised for the restriction of the obligation assumed by the Company, such stipulations must not be extended to favor limitations providing for forfeiture of the contract. They must be strictly construed and no unreasonable right of forfeiture should be allowed." See also Pingrey on Suretyship and Guarantee, 2nd edition, page 442.